

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

OWEN DIAZ,) Case No. 17-cv-06748-WHO
) San Francisco, California
Plaintiff,)
) Tuesday, January 17, 2023
v.)
) ZOOM WEBINAR PROCEEDINGS
TESLA, INC., et al.,)
)
Defendants.)
_____)

TRANSCRIPT OF CASE MANAGEMENT CONFERENCE
BEFORE THE HONORABLE WILLIAM H. ORRICK
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES: (Via Zoom)

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1 SAN FRANCISCO, CALIFORNIA TUESDAY, JANUARY 17, 2023 1:54 P.M.

2 --oOo--

3 THE CLERK: And we will get underway with Case Number
4 17-6758, Diaz v. Tesla, Inc. Counsel, if you would, please, state
5 your appearance for the record.

6 MR. ORGAN: Larry Organ for the Plaintiff.

7 MR. ALEXANDER: Bernard Alexander for the Plaintiff.

8 MR. RUBIN: And Michael Rubin for the Plaintiff.

9 MR. POSNER: Dan Posner for the Defendant Tesla.

10 MR. GRIFFIN: Asher Griffin for the Defendant Tesla.

11 THE COURT: All right. Good afternoon to you, all, and
12 thank you for sending the joint statement. That was exactly what
13 I was looking for before, so I appreciate your doing -- doing that
14 helps me get a sense of where things stand.

15 It appears to me -- so I'm going to give you my sense of
16 all these things and then you can, to the extent it's worth
17 talking further about them, we can do that now or we can save that
18 for the pretrial conference. It appears that I have a lot of
19 discretion in the shape of the trial, and I would exercise that
20 discretion in not allowing the evidence regarding incidents. I
21 would allow what was admitted before. I wouldn't have new
22 witnesses who weren't listed before testifying. Ms. Heisen's
23 testimony by video I think would be okay, but I also think the
24 defense -- if it chooses to have a new PMK give live testimony,
25 that would also be okay, but the testimony could not be materially

1 different than what had previously been given.

2 To the extent -- I'll look at motions in limine that
3 target specific testimony. My memory of what Tesla was referring
4 to as "Me Too" evidence would go, I would think, to pervasiveness
5 and punitive damages. But I'm happy to look at specific things if
6 there's a concern about that.

7 My trial plan is that you're going to finish this trial
8 the week that we start it. So it's starting on March 27th. It's
9 going to finish on the 31st. Each side will have nine hours and
10 we'll go as long -- we'll have a full day on Monday and hopefully
11 get into the -- and complete the opening statements, although that
12 may be aggressive. We'll see.

13 But then on Friday, we would have a long day as well and
14 the other Tuesday, Wednesday, Thursday will go 8:30 to 1:30.

15 MR. ORGAN: Your Honor, are you going to do the -- are
16 we going to do jury selection like we did before -- the week
17 before?

18 THE COURT: So -- so the -- the jury selection date is
19 I think going to be Monday, the 27th. On the 24th, we'll consider
20 the questionnaires and we'll do that at a hearing at 1:30 in the
21 afternoon.

22 So you'll get the survey responses a couple of days in
23 advance of that. I haven't figured out that -- those dates
24 completely with the Jury Office yet, but that you'll have them a
25 couple of days in advance of that.

1 And you'll have -- we can --- we have the questionnaire.
2 I don't know that we need to tweak it at all. But to the extent
3 that it does need to be tweaked, we would do that at the pretrial
4 conference.

5 And then with respect to the case statement and the
6 instructions that you have provided, I'll look at those at the
7 pretrial conference, so I don't think we need to get into those at
8 this point.

9 So that's my -- those are my thoughts about this, so let
10 me start with the Plaintiffs. Is there any -- do you have any
11 questions about this or want to discuss anything in particular
12 prior to the pretrial conference?

13 MR. ALEXANDER: Not at this time.

14 THE COURT: Okay.

15 MR. RUBIN: I would just add one thing, Your Honor.

16 THE COURT: Sure.

17 MR. RUBIN: The parties are -- we're still meeting and
18 conferring, and I suspect the versions of the statement in the
19 instructions will be somewhat different by the time they get to
20 resolve. We'll continue to talk about them.

21 THE COURT: Good. I'm glad you're doing that. And --
22 but if you can't agree, then I can -- they're close enough now
23 that I can fix them, but I would prefer that you agree on them as
24 opposed to for me.

25 MR. ORGAN: I've --

1 THE COURT: I'm sorry?

2 MR. ORGAN: Yeah. I've got one more thing, Your Honor.
3 I'm sorry. And that has to do with exhibits. I assume based on
4 your ruling then, the scope of exhibits would be what was admitted
5 in the first trial, subject to relevance in the second trial. Is
6 that --

7 THE COURT: That's the way that I'm thinking about it.
8 And, again, if there are specific exhibits that you -- if you
9 disagree on the admissibility for some other reason, I'm -- you
10 can raise it at the motions in limine, but that's the way that I'm
11 thinking about the case generally.

12 MR. ORGAN: Okay.

13 THE COURT: Mr. Posner or Mr. Griffin?

14 MR. POSNER: Thank you, Your Honor. So, you know, I
15 think the two most important issues are probably those that you
16 addressed -- the witness issue, which is who's going to be able to
17 testify, and scope of evidence -- "Me Too" evidence.

18 On the witness issues, I know -- I heard what Your Honor
19 said, what your inclination is, but we'd certainly like the
20 chance, the opportunity to make our argument more formally about
21 why certain of the witnesses that Your Honor might be inclined to
22 not let testify should testify.

23 In particular, Mr. Hurtado, and I think your -- your
24 preference it sounds like is not to add new witnesses or evidence.
25 We -- we might be open to -- you know, we feel like Mr. Hurtado

1 should be able to testify regardless because he was such a big
2 part of the first trial. We might be able to replace him with one
3 of the witnesses who did testify in the first trial, so it
4 wouldn't add incrementally a new witness.

5 But there's issues about this that aren't fully formed
6 in our statement that we'd like the chance to address. Can we do
7 that through a motion, a motion in limine, or would you rather
8 just wait to discuss it at the pretrial conference, or what would
9 your preference be?

10 THE COURT: Well, so I think you'll have a pretty steep
11 hill to climb with Mr. Hurtado himself, given that he was never on
12 your initial lists. I -- I always let people file things because
13 I get nervous when I don't that somebody's going to claim that I
14 didn't look at things fully. You've done this to me before on
15 something that I've given a very clear indication on without --
16 and so I -- I will -- if you file -- if you don't think that
17 there's an issue that's fully fleshed out that you think needs to
18 be preserved in a particular way that's -- that I haven't allowed,
19 I'd like to allow you to do that. But I -- just --

20 MR. POSNER: You're appropriately gun-shy, Your Honor.
21 We understand. But it's an important issue. I believe we said he
22 was mentioned 90 times at the first trial and --

23 THE COURT: You might do better trying to limit argument
24 that you should -- that the Plaintiff should limit what they say.
25 As an -- about Mr. Hurtado. As an example, I think you said in

1 the last CMC statement that Mr. Alexander mentioned him 58 times
2 or something like that into closing, whatever -- whatever that was
3 and that you refused to bring him forward. Well, that's not true
4 anymore because you really want to bring him forward, so I think
5 you people would have to be more judicious in how that was
6 described, but -- it's up to -- if you think it's -- it would deny
7 your client a fair trial for some reason, I'm happy to take a look
8 at it and make a ruling.

9 MR. POSNER: Understood. And the other issue that I
10 heard Your Honor say is that the "Me Too" evidence would likely go
11 to pervasiveness for purposes of reprehensibility. We do think
12 the law draws a pretty clear distinction, a clear distinction
13 between the admissibility and the relevance of evidence of harm to
14 others with respect to the threshold determination of
15 reprehensibility and whether there should be punitive damages on
16 the one hand and, on the other hand, the amount of punitive
17 damages.

18 And so we made our pitch before that this trial, because
19 of the overlapping evidence between liability and damages, should
20 revisit the findings of liability. We're moving past that. But
21 given that this trial now is limited to damages, the amount of
22 damages, we feel the law is clear that that evidence doesn't come
23 in at all. And this is the Supreme Court -- the *Philip Morris*
24 case, *Philip Morris v. Williams*, and the Ninth Circuit *White v.*
25 *Ford* case.

1 So that seems like an appropriate motion in limine for
2 us to bring. Given that it's exclusion of evidence, we'll try to
3 be as specific as we can, but it sounds like Your Honor would be
4 open to us filing that motion.

5 THE COURT: Yeah, absolutely. Because I did not go back
6 to any of the evidence and I certainly didn't go to the law, but
7 that was my -- I told you what my recollection was of the evidence
8 and how -- how it played in.

9 MR. POSNER: Understood. This is more of a clerical
10 point. There's a -- there's a deadline in the previous court
11 schedule to exchange motions in limines several days before
12 they're filed. I sent an email to counsel about that. Maybe
13 that's something we can work out, but because it's an order, I
14 wanted to bring it up as well.

15 I think the January 30 exchange date is sort of a
16 catchall of certain pretrial filings which include motions in
17 limine, but it seems maybe unnecessary to exchange our motions in
18 limine before they're filed on the 3rd. And so I'm wondering if
19 we could avoid that January 30 exchange deadline. Suffice it to
20 say we've been meeting and conferring on motions in limine. We'll
21 continue to do so. But if we could just simply file motions on
22 the 3rd without having to exchange them on the 30th.

23 THE COURT: I think that's up to you. As long as you
24 don't change dates that I'm interested in. The reason to exchange
25 them is to give the other sides a heads up as to what the issues

1 are. Maybe you can avoid filing those motions and that's the --
2 that's the entire purpose of them -- of that order. But if you --
3 if the -- if both sides decide that it's unnecessary, then that's
4 -- you can dispense with them.

5 MR. POSNER: Understood.

6 MR. RUBIN: We'll discuss it among counsel, Your Honor.
7 But just as, despite all the meet and confers, today is the first
8 time we heard a reference to *Philip Morris* and *White*. It's
9 probably in our interest to have those extra three days knowing
10 what Tesla's going to argue, but we'll talk about it with counsel.

11 THE COURT: Okay.

12 MR. POSNER: Your Honor, there's no deadline to file
13 reply briefs on motions in limine. Is that Your Honor's
14 preference?

15 THE COURT: I think there's a reason that there's no
16 deadline, is usually I don't take them. I look at what the
17 motions are and then I -- I make my rulings, so that's -- that
18 would be why and that's -- they get filed -- again, I don't know
19 what the time is, so that's why there's no deadline for them.

20 MR. POSNER: Okay. Yes. I understand. I defer to Mr.
21 Griffin for further issues about witnesses and things.

22 MR. GRIFFIN: Your Honor, Asher Griffin for Tesla. I
23 wanted to seek a clarification on the witness point. One of the
24 witnesses that we identified in our statement was Andres Donet.
25 That was a witness who was deposed in the first case prior to

1 trial and that was, like Mr. Hurtado, a witness that Plaintiff's
2 counsel referred to as someone that Tesla didn't call in the first
3 trial. And so I was seeking clarification. Given that he was
4 disclosed and deposed prior to the first trial, would there be any
5 indication on Tesla's ability to call Mr. Donet in this case?

6 THE COURT: Well, I was thinking that -- that there
7 would be because he didn't testify in the first -- you made a --
8 the -- your client made choices in how the case was going to be
9 presented in the first trial. And the only issues that are open
10 for discussion are the -- are the damages issues and punitive
11 damages.

12 So I'm not -- the shape of the case on all the other
13 issues I was hoping to have as consistent with the first one as
14 possible. I think there was something else that the Plaintiffs
15 had mentioned about Mr. Donet and his lack of relevance in this
16 case, but that's the way that I'm thinking about it, Mr. Griffin.
17 Again, if there is some fundamental reason why his testimony
18 should be presented in light of the choices that your client has
19 already made, I'll look at it.

20 MR. GRIFFIN: I think that -- Your Honor, I think that
21 one of the issues is similar to the issue with Mr. Hurtado, that
22 in closing argument there was argument that we didn't bring Mr.
23 Donet in to respond to questions about graffiti in the bathrooms
24 and the like and how that was addressed. And, you know, obviously
25 similar to Mr. Hurtado here, you know, we would like to have the

1 opportunity to bring Mr. Donet in to address those concerns,
2 either by live or his deposition testimony. And so --

3 THE COURT: So you might make that alternative motion
4 that I was -- I was suggesting to Mr. Posner, but you can do both
5 -- make both motions and then I'll look at it if you -- if you
6 think that it's appropriate to do so.

7 MR. GRIFFIN: Okay. And then -- I'm going to clarify,
8 but I think I might understand where you're going to go. With
9 regards to the exhibits, obviously there were exhibits entered in
10 the first trial but there were obviously more documents produced
11 by either side other than the admitted exhibits, and it was our
12 intention to review the documents that were in the parties'
13 possession, not, you know, rely on new documents or produce new
14 material. But to the extent we wanted to use documents that are
15 in the record or in the parties' possession that may have been
16 deposition exhibits but not admitted in the first trial, we wanted
17 the Court's guidance on -- on whether or not we would have the
18 opportunity to make different strategic decisions on what -- how
19 to use certain documents, how to use -- with certain witnesses in
20 the retrial.

21 THE COURT: Yeah. And, again, generally I think my --
22 my instinct is no, that the record is -- is the record. But if
23 there is some reason why it is -- it would be unfair to exclude
24 something, then I'm happy to take a look at that at the pretrial
25 conference.

1 MR. GRIFFIN: Thank you, Your Honor.

2 MR. ORGAN: Your Honor, I do have a question about that.
3 If Defendants -- if Defendant decides to make a motion about those
4 exhibits, many of the exhibits were marked as confidential. I
5 assume that in lodging them with the court, that confidentiality
6 component of the Court's protective order then is sort of
7 expunged, such that any documents that were lodged with the court,
8 even if they weren't admitted into evidence, the confidentiality
9 goes away so that we don't have to file those things under seal.

10 Is that correct, Your Honor?

11 THE COURT: I'm not exactly sure what you just said, Mr.
12 Organ. My belief is that if you've got -- if there is some
13 agreement regarding confidentiality, that you ought to follow
14 whatever that agreement is and -- and then I take a look at things
15 and see whether they actually should be filed under seal. But I
16 can't give you a blanket don't follow an agreement that you've
17 already entered ruling.

18 MR. ORGAN: I understand, Your Honor. I was just
19 wondering if the fact that we had filed them with the court or
20 lodged them with the court under the standard protective order
21 that the Northern District has, whether or not that essentially
22 means that they are now in the public domain. That was my
23 question. I guess I didn't articulate it very well, so --

24 THE COURT: So my suggestion is that you look at the
25 Local Rule with respect to sealing and how that operates. If --

1 if a document is filed under seal, it will stay under seal until
2 I make a ruling one way or another that it's appropriate to be
3 sealed. And -- but if it's a document that is going to be
4 introduced into evidence at trial, it's very unlikely that I'm
5 going to maintain the confidentiality of that document unless it's
6 a super secret kind of a thing, which in this case may relate
7 to -- I would have to take a look at the document.

8 MR. ORGAN: Okay. Thank you, Your Honor. I appreciate
9 that.

10 MR. GRIFFIN: Your Honor, and I apologize. I have one
11 more question about the scope of the evidence in retrial. We
12 discussed with Plaintiff's counsel their expert on psychiatric
13 issues and Mr. Diaz's mental state. And my understanding --
14 Plaintiff's counsel, correct me if I'm wrong -- is that they don't
15 intend to update that report, but we were considering Mr. Diaz's
16 testimony about his mental state. We obviously know what -- where
17 he was as of October 2021, but now we're 18 months past that and,
18 you know, it would be our expectation that there wouldn't be any
19 new evidence of mental anguish or harm or any considerations past
20 October 2021 that would be able to be presented to this jury in
21 the retrial.

22 Is that your understanding, Your Honor?

23 THE COURT: Well, it's my understanding that the expert
24 report wouldn't be able to be updated. And in general, I would
25 agree with you that the -- the evidence really is the evidence as

1 of the -- the time of the first trial.

2 MR. GRIFFIN: Thank you, Your Honor, because it just
3 highlights the issue we were concerned about. If there had been
4 issues post-October 2021 through March that we were unaware of,
5 then we didn't want to have a situation where that was surprise
6 during the course of trial.

7 THE COURT: I assume, Mr. Organ and Mr. Alexander, that
8 that's not the case?

9 MR. ORGAN: Yeah. We are not updating the report, Your
10 Honor.

11 THE COURT: Okay.

12 MR. ORGAN: We heard --

13 THE COURT: And there is no new evidence that you --

14 MR. ORGAN: No.

15 THE COURT: -- would be presenting about Mr. Diaz's
16 emotional state in the last year and a bit?

17 MR. ORGAN: Right. And, similarly, there would be no
18 evidence about his state since the -- since the last trial so that
19 they can't put in any kind of (indiscernible) or anything like
20 that since then.

21 MR. ALEXANDER: And the issue is there would be no
22 questioning of him for anything -- for anything after that time
23 period of -- of the last verdict. So everything is from the
24 verdict backwards.

25 THE COURT: Yeah. And I think that -- I think we have

1 to be very clear about that. So let's make sure that -- that
2 everybody is on the same page at the pretrial conference, but that
3 would be my anticipation. And how that -- whether it needs to be
4 explained to the jury or -- and how we explain it is something
5 that you all should consider.

6 MR. POSNER: Thank you, Your Honor.

7 THE COURT: Okay. Anything else at this point.

8 MR. ORGAN: Your Honor, I can't remember. Is there a
9 limit on MILs?

10 THE COURT: There is no limit on the number of MILs.
11 There's a page limit of 25 pages.

12 MR. ORGAN: Okay.

13 THE COURT: Total.

14 MR. ORGAN: Yeah.

15 THE COURT: All right. Anything further?

16 MR. ORGAN: No, Your Honor.

17 MR. POSNER: No, Your Honor.

18 THE COURT: All right. Well, I will look forward to
19 seeing you again.

20 MR. RUBIN: Thank you, Your Honor.

21 MR. ORGAN: Thank you, Your Honor.

22 MR. POSNER: Thank you, Your Honor.

23 MR. GRIFFIN: Thank you, Your Honor.

24 THE COURT: Have a good afternoon.

25 MR. ORGAN: Take care. Bye-bye.

1 MS. NUNLEY: Thank you, Your Honor.

2 (Proceedings adjourned at 2:17 p.m.)

3

4 I, Peggy Schuerger, certify that the foregoing is a
5 correct transcript from the official electronic sound recording
6 provided to me of the proceedings in the above-entitled matter.

7

8 Peggy Schuerger
Signature of Approved Transcriber

January 19, 2023
Date

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